Filed 6/28/19 P. v. Cabrera CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OSCAR AMEZCUA CABRERA, Defendant and Appellant.	H044409 (Santa Cruz County Super. Ct. No. F17051)

A jury convicted defendant Oscar Amezcua Cabrera of murdering Joe C.[1] and found true a special circumstance allegation that defendant committed the murder for the benefit of a criminal street gang and a sentence enhancement allegation to the same effect. Jurors also found that defendant personally and intentionally discharged a firearm in committing the offense. The trial court found true certain prior conviction allegations and sentenced defendant to life in prison without the possibility of parole consecutive to 30 years. On appeal, defendant challenges the admission of Joe's statement identifying defendant as his shooter, the denial of various pretrial motions, and the sufficiency of the evidence supporting the gang-murder special circumstance. We reject these challenges and affirm.

[1] To protect personal privacy interests, we refer to the victim and certain lay witnesses by their first names and last initials or by initials only. (Cal. Rules of Court, rule 8.90.)

I. FACTUAL SUMMARY

A. The Events of March 13, 2006

E.T. testified that defendant and Joe were at his home in the Larkin Valley area of Santa Cruz County at approximately 7:00 p.m. in the evening of March 13, 2006.[2] Defendant occasionally did work for E.T., who considered defendant a friend. Joe also worked for E.T. On the evening of March 13, 2006, defendant stopped by E.T.'s house with some beer. About 15 or 20 minutes later, Joe came over with a couple of other friends. Those friends left a few minutes later. According to E.T., Joe was drunk when he arrived.

E.T., defendant, and Joe hung out for 30 to 45 minutes until E.T. said he needed to go to the grocery store. Joe asked him for a ride into Watsonville. E.T. agreed, but said he needed to shower first. Defendant was on his way to town and agreed to give Joe a ride. The two left together. E.T. did not see what vehicle defendant was driving that night, but testified that defendant had three vehicles, including a silver Toyota truck.

E.T. testified that his home is about a five-minute drive from the intersection of Buena Vista Drive and Larkin Valley Road. That intersection is located in a rural area without street lights.

Between 8:49 p.m. and 8:54 p.m. five different individuals called 911 and reported seeing a person in or near the intersection of Buena Vista and Larkin Valley who appeared to be in need of assistance. One of those callers, Edgar V., stopped to help. Edgar testified that the person, who was later identified as Joe, was covered in blood and unable to sit up. Joe told Edgar he had been shot. At the direction of the 911 dispatcher, Edgar asked Joe if he knew who shot him. Edgar testified that Joe "said . . . really clear[ly], ['']Oscar['], [but . . . mumbled [the last name], but then he said it [a] second

[2] On March 14, 2006, E.T. told police officers that defendant and Joe arrived at his home between about 7:30 and 8:00 p.m. the night before.

time and he said it clear. . . . [T]he name he said was Oscar Cabrera." Edgar described Joe as being on "his last breath" and "turn[ing] gray."

The police dispatcher relayed the suspect's name to officers.

Santa Cruz County Sheriff's deputies arrived at the scene at 8:55 p.m. Two of those deputies testified that Joe repeatedly said "[']I'm dying, I need to get to a hospital.[']" Paramedics declared Joe dead at the scene at 9:10 p.m.

At 9:54 p.m. someone called 911 to report a pickup truck on fire on Johnson Road. Firefighters arrived at 30 Johnson Road at 10:00 p.m. to find a gray Toyota pickup truck "fully engulfed" in flames. They extinguished the fire within approximately 10 minutes. The inside of the truck's cab was "completely burnt." There was a red gas can in the bed of the pickup truck. The fire engine captain in charge testified that he believed, based on his preliminary observations at the scene, that it was an arson fire. The indicators of possible arson included the smell of gasoline in the bed of the pickup, the burned gas can, and the fact that the fire did not appear to have started in the engine compartment, as is typical in vehicle fires.

It takes between 14 and 30 minutes to drive from the intersection of Buena Vista Drive and Larkin Valley Road, where Joe died, to 30 Johnson Road, where the pickup truck was found.

B. Evidence Connecting Defendant to the Burned Pickup Truck

The burned truck was a 1989 gray, single-cab Toyota pickup truck with license plate number 3X87415. It was registered to a woman with the initials G.M. at 84 Clausen Road in Watsonville. In 2006, G.M. told police that she had sold the truck to someone named Oscar, but then said that in fact the buyer's name was Omar. By the time of trial, G.M. had married Armand Valle[3] and was using her married name.

[3] Two gang experts testified that Armand Valle was a member of North Side Watsonville and, later, of Nuestra Familia. Pictures of Valle with defendant were shown at trial.

She testified that she had briefly owned a gray Toyota pickup truck. It had been Valle's truck before he transferred title to her name. She sold the truck in late 2004 or early 2005. She could not recall whom she sold the truck to and denied selling it to defendant. She testified that she had never lived at 84 Clausen Road and was unfamiliar with the address. Defendant lived at 84 Clausen Road in 2004.

E.T. told a Santa Cruz County Sheriff's Office homicide investigator in August 2006 that defendant "drove an early '90s or '90s long-bed standard cab, gray, Toyota pick-up, with alloy wheels, and a diamond plate toolbox." That same day, E.T. reviewed pictures of the burned pickup truck and told the investigator that the truck was defendant's.

A partially burned document recovered from the floor of the burned pickup truck bore defendant's name. Defendant had insured a 1989 Toyota pickup truck. Twice in 2005, police officers had observed defendant in a gray Toyota pickup truck with the same license plate number as the burned truck—3X87415.

C. The Autopsy Results

The pathologist coroner for the Santa Cruz County Sheriff's Department performed an autopsy on Joe. He testified that Joe suffered two contact gunshot wounds, meaning the muzzle of the gun was pressed against the skin. One of those wounds was to the base of the neck on the right side; the other was to the left chest. The bullets injured many of Joe's internal organs, including his liver, colon, stomach, pancreas, and right lung. The coroner recovered two bullets from inside Joe's body, which he opined were either .38-caliber Special cartridges or .357 magnum cartridges.

The coroner found that Joe's blood alcohol level was 0.186 grams percent and that his blood contained 140 nanograms per milliliter of methamphetamine. The coroner characterized the levels of alcohol and methamphetamine in Joe's blood as "significant." The coroner also testified that Joe's "liver was about twice normal size and it was full of fat," which prompted the coroner to conclude that Joe "was obviously an alcoholic."

The coroner opined that an alcoholic has a higher tolerance for alcohol and "can easily walk around with a [blood alcohol level] that would render one of us unconscious and they have a certain degree of tolerance for it and they look like they are normal."

D. Forensic Evidence

Police never recovered shell casings for the bullets that killed Joe. A firearms expert opined that the bullets recovered from Joe were shot by the same gun, which was a .38-caliber revolver or a .357 magnum revolver.

No hair, blood, or fingerprint evidence was found in the burned pickup truck.

E. Defendant's Disappearance and Later Arrest in Mexico

E.T. never saw or heard from defendant after March 13, 2006. Neither did defendant's mother-in-law see him again after March 13, 2006. She testified that at that time, defendant had a nine-month-old child and his wife was pregnant. Defendant was not present for the birth of his second child in August 2006.

Defendant was arrested in August 2013 in Mexico, where he was living with a new wife. Defendant tried, unsuccessfully, to bribe the arresting officers.

F. Gang Evidence

1. Nuestra Familia, Nuestra Raza, and Norteños

Michael Walker, an expert on Norteños, Nuestra Raza, and Nuestra Familia, opined that Nuestra Familia started as a Hispanic prison gang in the early- to mid- 1960s and has since evolved into an organized crime group. Since the 1970s, Nuestra Familia has been governed by a written constitution, which has been revised a number of times. The constitution addresses "how to conduct street operations; how to set up a Nuestra Familia sanctioned organization in a prison, if there isn't one when you arrive there; how to conduct operations within county jails; what the chain of command is; how you're supposed to communicate; who you're not supposed to communicate directly with, because of law enforcement investigations." Nuestra Familia is led by three generals. One general is in charge of all Nuestra Familia activity within prisons; one is in charge of

all Nuestra Familia activity on the streets and in the county jails; and one is in charge of finances and administrative issues. Below the generals are Category 3 members, then Category 2 members, and "then the introductory level to the N[uestra] F[amilia] would be a Category 1 member." Walker opined that there were approximately 50 Nuestra Familia members in 2006. He testified that the official symbol of Nuestra Familia is a sombrero with a dagger through it.

In the early 1980s, Nuestra Familia created a subordinate organization called Nuestra Raza to act on its behalf because prison officials had cracked down on Nuestra Familia members. Nuestra Raza is governed by the 14 bonds, which were issued by Nuestra Familia.

Street gang members are referred to as Norteños. In Santa Cruz County, the Norteño street gangs include North Side Watsonville, Varrio Green Valley, Clifford Manor Locos, and City Hall Watsonville.

Walker described Nuestra Raza as the JV team to Nuestra Familia's varsity. Santa Cruz County Sheriff's Office Sergeant Roy Morales, who testified as an expert in Norteño criminal street gangs and the Nuestra Familia, analogized the organization to baseball, characterizing Norteños as the farm league, Nuestra Raza as the minor league, and Nuestra Familia as the major league. He further testified Nuestra Familia, Nuestra Raza, and Norteño street gangs are all part of a single organization.

Nuestra Familia makes money through geographically based regiments composed of Nuestra Familia members, Nuestra Raza members, and Norteños. Regiments operate on the streets and are run by regiment commanders—generally Nuestra Familia members or Nuestra Raza members—who take their orders directly from Nuestra Familia. Walker testified that regiments make money through drug dealing, firearm sales, extortion, robberies, and prostitution and send between 30 and 50 percent of their proceeds to Nuestra Familia. Norteño street gangs also are required to make monthly monetary contributions to Nuestra Familia.

Walker testified that nonmembers who show disrespect to gang members "are going to pay a monetary fine for being disrespectful[,] . . . are probably going to have hands put on" them, and could even "be killed for it . . . ."

2. Evidence of Defendant's Gang Affiliation

a. Tattoo Evidence

Defendant has numerous tattoos, including a Huelga bird, a star, "14," "XIV," and "NSW." Walker testified that defendant's "NSW" tattoo stands for "North Side Watsonville," a Norteño street gang. Walker testified that the star and Huelga bird tattoos signified membership in the Nuestra Raza in the early 2000s. And he testified that tattoos of the number 14, in either Arabic or Roman numerals, are common among Norteños because "N" is the 14th letter of the alphabet.

b. Documentary Evidence

The jury was shown numerous photographs that police had seized from defendant's residences in 2004 and 2006 pursuant to three search warrants. The photographs depicted defendant wearing red, a color associated with Norteños; flashing Norteño gang signs; and posing with other known gang members.

During one 2004 search of defendant's residence, police also seized newspaper articles about the indictment of Nuestra Familia members. Walker testified that "it's common for Nuestra Familia and Nuestra Raza members to keep newspapers clippings and articles about the organization." Police also seized a copy of the book *Art of War*, which Walker testified is required reading for potential Nuestra Familia members. The same search yielded excerpts from the book *The Rise and Fall of the Nuestra Familia*, as well as a CD containing approximately 2,000 pages of Nuestra Familia-related documents. Those documents included a copy of a federal indictment of Nuestra Familia members, which had been filed under seal and should have been unavailable to the public, and a copy of an early version of the Nuestra Familia constitution.

c. Operation Northern Exposure

In 2003 or 2004, various state and federal agencies (including the Watsonville Police Department, the Santa Cruz County Sheriff's Office, the California Department of Justice's Bureau of Narcotics Enforcement, and the FBI) formed a joint task force to investigate the Nuestra Familia in Santa Clara, Monterey, and Santa Cruz Counties. Their investigation was code-named Operation Northern Exposure. Members of the task force included Roland Martinez, a special agent with the FBI; Sergeant Morales from the Santa Cruz County Sheriff's Office; and special agent Walker from the Bureau of Narcotics Enforcement, all of whom testified at trial. Defendant was a primary target of the investigation.

d. Gang Expert Opinions

Walker opined that at the time of Joe's muder in March 2006, defendant was a member of the Nuestra Familia and the Santa Cruz County regiment commander. He based his opinion on his personal knowledge, gleaned during the Operation Northern Exposure investigation, and on items seized from defendant's residence, including the federal indictment, the Nuestra Familia-related news clippings, and the copy of *Art of War*. Morales opined that defendant was a member of North Side Watsonville in 1995. Morales further opined that defendant established the Nuestra Familia regiment in Watsonville and that, at the time of Joe's murder, defendant was a member of Nuestra Familia and the commander of the Nuestra Familia regiment in Watsonville. Morales based his opinions on defendant's tattoos; photographs of defendant wearing red, flashing gang signs, and in the company of known gang members; and on Nuestra Familia-related items seized from defendant's residence, including news clippings and excerpts of *The Rise and Fall of the Nuestra Familia*.

G. Witness No. 7

Witness No. 7 testified that he is a former member of the Clifford Manor Locos street gang, Nuestra Raza, and the Nuestra Familia regiment in Watsonville. He left the gang in 2012, while serving time in prison for attempted murder.

Witness No. 7 testified that he got to know defendant in jail in 2000, at which time they discussed creating a more established criminal organization and selling cocaine in Watsonville. After both men were released, defendant began supplying Witness No. 7 with cocaine to sell. By 2003, they had shifted to selling methamphetamine. In 2004, Witness No. 7 became a member of Nuestra Raza. He explained that, to become a member of Nuestra Raza, two Nuestra Raza members must sponsor you and a Nuestra Familia member must endorse you. Defendant was the Nuestra Familia member who endorsed Witness No. 7 for membership in Nuestra Raza.

Witness No. 7 paid defendant a certain amount of money each month from his drug sales. Eventually that monthly contribution reached $3,000. Defendant told Witness No. 7 that a percentage of those funds were sent to incarcerated Nuestra Familia generals. In addition to selling drugs, Witness No. 7 robbed other drug dealers who refused to pay "taxes or rent" to the gang on the theory that proceeds from "any type of illegal activity from Bakersfield to the Oregon border is . . . N[uestra] F[amilia] money."

Witness No. 7 said that defendant regularly carried a .38-caliber revolver in his pocket. Defendant told Witness No. 7 that "the best weapon to use in a murder would be a .38 revolver because there would be no shell casings . . . ." Defendant also recommended "burn[ing] . . . [a]nything that would trace you back to that crime."

Witness No. 7 testified that in 2005 defendant ordered him to kill Mark Escobedo, a Nuestra Raza member who was using drugs in violation of gang policy. Defendant gave Witness No. 7 a .38-caliber revolver to use in the killing. With the help of Tony Rubalcava, another member of the Watsonville Nuestra Familia regiment, Witness No. 7 attempted to kill Escobedo but failed. Four years later, Witness No. 7 was arrested. He

pleaded guilty to attempted murder and was serving a 15-year sentence at the time of trial.

Witness No. 7 testified that defendant had told him that Joe was "punking" or bullying younger gang members. Generally, "getting beat up" would be the consequence for such behavior. However, it could get you killed if an "example[] need[s] to be made." And as regimental commander, defendant was in the position to decide how to deal with Joe.

Witness No. 7 testified that he and other members of the regiment regularly listened to police scanners. On the night Joe was killed, Witness No. 7 heard on his police scanner that someone had been killed and that defendant was a suspect. Witness No. 7 called defendant's cell phone and warned him not to go home because the police knew he had shot someone. Defendant thanked him. Witness No. 7 did not see defendant again until the trial.

Witness No. 7 said that he was testifying against defendant, who had been a friend, to make amends. He acknowledged that he had an agreement with the prosecutor under which his sentence would be reduced by five years if he testified truthfully.

II. PROCEDURAL BACKGROUND

In the operative first amended information, the Santa Cruz County District Attorney charged defendant with first degree murder (Pen. Code, § 187. subd. (a)).[4] The amended information included allegations that defendant (1) intentionally killed Joe while defendant was an active participant in a criminal street gang and to further the activities of that gang (§ 190.2, subd. (a)(22)); (2) personally and intentionally used and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d)); and (3) committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and

[4] All further statutory references are to the Penal Code unless otherwise noted.

assist in criminal conduct by gang members (§ 186.22, subd. (b)). The amended information also alleged that defendant had suffered three strike priors (§ 667, subds. (b)-(i)); one prior serious felony conviction (§ 667, subd. (a)(1)); and two prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a jury trial. The first witnesses testified on October 11, 2016. On December 1, 2016, after hearing weeks of testimony and deliberating for one day, jurors found defendant guilty of first degree murder and found true the gang-murder special circumstance (§ 190.2, subd. (a)(22)), firearm enhancement (§ 12022.53, subd. (d)), and gang enhancement (§ 186.22, subd. (b)(1)) allegations.

A court trial on the prior conviction allegations took place on February 24, 2017. On the prosecutor's motion, the court dismissed one strike allegation. The court found that defendant had suffered one strike, one prior serious felony conviction, and two prior prison terms. Also on February 24, 2017, the court sentenced defendant to life in prison without the possibility of parole (§§ 187, 190.2, subd. (a)(22)), plus a consecutive 25-year term for the firearm enhancement (§ 12022.53, subdivision (d)), and a consecutive five-year term for the prior serious felony conviction (§ 667, subd. (a)(1)). The court struck the 10-year gang enhancement (§ 186.22, subd. (b)(1)) and stayed the prior prison term enhancement (§ 667.5, subd. (b)).

Defendant timely appealed.

III. DISCUSSION

A. Admissibility of Joe's Identification of Defendant as the Shooter

Defendant moved in limine to exclude Joe's statement identifying him as the shooter on hearsay grounds. The trial court denied that motion, ruling that Joe's statement was admissible under the dying declaration and spontaneous statement exceptions to the hearsay rule. Defendant argues that was reversible error. We conclude

the trial court correctly admitted the statement as a dying declaration and do not reach the issue of whether it also qualified as a spontaneous statement.

1. Legal Principles

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subd. (b).) The dying declaration exception to the hearsay rule provides: "Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death." (*Id*., § 1242.)

We review the trial court's findings of foundational facts—such as whether the declarant had a sense of impending death as required by the dying declaration exception—for substantial evidence. (*People v. Sims* (1993) 5 Cal.4th 405, 459 (*Sims*); *People v. Merriman* (2014) 60 Cal.4th 1, 65-66.) And we review the trial court's decision to admit or exclude a hearsay statement for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 956.) The "improper admission of hearsay . . . constitute[s] statutory error under the Evidence Code." (*People v. Sanchez* (2016) 63 Cal.4th 665, 685.) The standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, under which an error is prejudicial if it is "reasonably probable that a result more favorable to" defendant would have been reached in its absence, applies to such state law errors. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].)

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " (*Crawford v. Washington* (2004) 541 U.S. 36, 42.) In *Crawford*, the United States Supreme Court held that the admission of " 'testimonial' " hearsay violates

a criminal defendant's confrontation rights unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*People v. Leon* (2015) 61 Cal.4th 569, 602-603.) "Although the Supreme Court has not settled on a clear definition of what makes a statement testimonial, [our state Supreme Court has] discerned two requirements. First, 'the out-of-court statement must have been made with some degree of formality or solemnity.' [Citation.] Second, the primary purpose of the statement must 'pertain[ ] in some fashion to a criminal prosecution.' [Citation.]" (*Id*. at p. 603.) The improper admission of testimonial hearsay violates the Confrontation Clause of the Sixth Amendment; the harmless-beyond-a-reasonable-doubt test for prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) applies to such constitutional errors.

2. The Trial Court Did Not Prejudicially Err in Admitting the Identification Under the Dying Declaration Exception

Defendant contends Joe's statement identifying him as the shooter was not admissible as a dying declaration because: (1) substantial evidence does not support the finding that Joe was "under a sense of immediately impending death" when he made the statement; (2) Joe was an incompetent witness at the time he made the statement because he was drunk and high; and (3) the statement was testimonial, such that its admission violated defendant's federal constitutional right to confront witnesses against him.

a. Sense of Immediately Impending Death

Defendant's argument that there was insufficient evidence that Joe was under a sense of immediately impending death is two-fold. We address each aspect of that argument in turn.

Defendant's first contention is based on the content of Joe's repeated statements to officers: "I'm dying, I need to get to a hospital." According to defendant, Joe's reference to the hospital shows he retained hope for survival and therefore did not have the requisite sense of immediately impending death. Our Supreme Court rejected a

similar argument in *Sims*. There, the declarant, who was "bleeding profusely from gunshot wounds to his head and neck," pleaded with a paramedic not to let him die. (*Sims, supra,* 5 Cal.4th at pp. 425, 457.) When the paramedic assured the declarant that he would survive, the declarant said the "assurances were 'bullshit' " and " 'I feel like I am going to die.' " (*Id*. at p. 458.) At the hospital, the declarant identified his shooter several times before he died. The *Sims* court reasoned that the declarant's "desperate plea that his life be saved indicate[d] . . . a sense of impending death . . . ." (*Id*. at p. 459.) The court also noted that the declarant "thereafter expressly articulated his perception that death was imminent." (*Ibid*.) "[P]erceiv[ing] no incompatibility between the belief of a mortally wounded victim that he is about to die and his desire to receive whatever benefit might be afforded by immediate medical treatment," the court concluded that substantial evidence supported the trial court's finding that the declarant had the requisite sense of impending death. (*Ibid*.)

Here, Joe repeatedly said, "I'm dying, I need to get to a hospital." Like the *Sims* declarant's "desperate plea that his life be saved," Joe's desire to be taken to a hospital because he was "dying" "indicate[d] . . . a sense of impending death . . . ." (*Sims*, *supra*, 5 Cal.4th at p. 459.) Moreover, each time Joe mentioned the hospital, he reiterated his belief that he was dying, suggesting a "desire to receive whatever benefit might be afforded by immediate medical treatment," rather than any real hope of survival. (*Ibid*.) Accordingly, *Sims* compels us to reject defendant's argument that insufficient evidence supports the trial court's finding that Joe was under a sense of immediately impending death merely because he wanted to be taken to a hospital. Defendant relies on out-of-state cases for his contrary view. That reliance is misplaced, particularly given the existence of binding Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

Defendant's second contention is based on the relative timing of Joe's statement identifying defendant as the shooter and Joe's statements, made five minutes later, that he

was dying. Defendant contends that, given that five-minute time lapse, substantial evidence does not support the trial court's finding that Joe was under a sense of immediately impending death at the time he made the identification.

The crucial inquiry is whether Joe was "under a sense of immediately impending death" at the time he identified defendant as the shooter. (Evid. Code, § 1242; *People v. Taylor* (1881) 59 Cal. 640, 647 (*Taylor*).) The existence of that "condition" may, but need not be, "shown by the declarant's own statements to that effect . . . ." (*Sims*, *supra*, 5 Cal.4th at p. 458.) It may also be "inferred from circumstances such as the declarant's physical condition, the extent of his injuries, his knowledge of his condition, and other types of statements made by the declarant." (*Ibid.*; see *Taylor*, *supra*, at p. 647 [declarant's sense of immediately impending death may " 'be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind' "].)

Here, the totality of the circumstances supported the reasonable inference that Joe was "under a sense of immediately impending death" at the time he identified defendant as the shooter even though he did not say so until five minutes later. Joe had been shot at close range in the neck and chest. Both bullets traveled through Joe's chest, inflicting independently lethal injuries that killed him less than 20 minutes after Edgar called 911. Before identifying defendant as the shooter, Joe told Edgar that he had been shot. Edgar described Joe as being covered in blood, unable to sit up, and seemingly taking "his last breath" at that time. The trial court reasonably could have inferred that Joe was "under a sense of immediately impending death" based on the seriousness of his gunshot wounds, his knowledge of those wounds, and his overall physical condition.

b. Joe's Competence

Defendant argues that even if Joe's statement identifying him as the shooter was a dying declaration, it nevertheless was inadmissible because Joe was too intoxicated to be a competent witness. The Attorney General responds that there was evidence that Joe was capable of understanding the question "Who shot you?" and communicating an understandable response, such that the trial court did not abuse its discretion in concluding that Joe was competent to testify at the time he made the dying declaration. We find no abuse of discretion.

"[T]he competency of [a hearsay] declarant may be challenged." (Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 194, p. 1052.) "A person is incompetent and disqualified to be a witness if he or she is '[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him' (Evid. Code, § 701, subd. (a)(1)), or is '[i]ncapable of understanding the duty of a witness to tell the truth.' (Evid. Code, § 701, subd. (a)(2).) '[T]he burden of proof is on the party who objects to the proffered witness, and a trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citations.]' [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 360.)

The coroner who performed Joe's autopsy testified that Joe's blood alcohol level was 0.186 grams percent and that his blood contained 140 nanograms per milliliter of methamphetamine. The coroner characterized those levels of alcohol and methamphetamine as "significant." The coroner also testified that size and fat content of Joe's liver indicated that Joe was an alcoholic and that alcoholics have a higher tolerance for alcohol. Edgar, who heard Joe identify defendant as the shooter and relayed that identification to the 911 dispatcher, testified that Joe clearly identified the shooter as "Oscar Cabrera." E.T. testified that on the evening of the shooting Joe was drunk but able to carry on a conversation and walk normally; he was not "stumbling over himself or anything like that." Based on the foregoing evidence, we conclude the trial court did not

abuse its discretion in concluding that Joe was competent to be a witness at the time he made the dying declaration.

c. Confrontation Clause

Finally, defendant argues that Joe's statements identifying him as the shooter were testimonial under *Crawford*, such that their admission violated his federal constitutional right to be confronted with the witnesses against him. As defendant acknowledges, the California Supreme Court has rejected that argument. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 762-765 [rejecting confrontation clause challenge to the admission of a dying declaration]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 292 (*D'Arcy*) [declining to revisit the holding in *Monterroso*]; *People v. Johnson* (2015) 61 Cal.4th 734, 761 [reaffirming *Monterroso* and *D'Arcy*].) We are bound to follow those decisions and accordingly reject defendant's confrontation clause challenge to the admission of Joe's dying declaration. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

Because we conclude the trial court did not err in admitting Joe's statement as a dying declaration, we do not reach the issue of whether it also was a spontaneous statement.

d. Prejudice

Even if the trial court erred in admitting Joe's statement identifying defendant as the shooter, the error was not prejudicial. Because there was no confrontation clause violation, the *Watson* standard of review applies. Accordingly, the proper inquiry is whether it is reasonably probable that a result more favorable to defendant would have been reached had Joe's statement identifying him as the shooter been excluded. For the following reasons, it is not.

The evidence that defendant shot and killed Joe was strong. Defendant was the last person to be seen with Joe before his death. E.T.'s testimony and statements to police indicated that defendant and Joe left E.T.'s home together in defendant's vehicle sometime between 7:30 and 8:45 p.m. At 8:49 p.m., calls began coming in to 911 saying

that a person needed help at the intersection of Buena Vista and Larkin Valley, a five-minute drive from E.T.'s home. Joe was shot with a .38-caliber revolver or a .357 magnum revolver. Witness No. 7 testified that defendant regularly carried a .38-caliber revolver. And Witness No. 7 testified that defendant had a motive to kill Joe, who had disrespected Norteño gang members in Watsonville, where defendant was the Nuestra Familia regimental commander. Two gang experts likewise testified that defendant was the Nuestra Familia regimental commander in Watsonville. Within an hour of the shooting, defendant's truck was abandoned and intentionally set on fire. Witness No. 7 testified that defendant recommended burning the evidence after committing murder. Defendant fled the country after the shooting, leaving behind his baby and his pregnant wife. While Joe's dying declaration identifying defendant as his shooter certainly was compelling evidence, in the context of this case it is not reasonably probable that a result more favorable to defendant would have been reached had jurors not learned of that statement.

B. Outrageous Government Misconduct

Defendant filed a pretrial motion to dismiss the charges against him for outrageous government conduct. The conduct at issue is that of Sergeant Morales during an interview of Witness No. 7. In defendant's view, Morales suborned perjury by encouraging Witness No. 7 not to tell the "truth" but to tell a "story" that would help the prosecutor achieve "a successful prosecution" (i.e., obtain a conviction of defendant for Joe's murder). The prosecutor opposed the motion, arguing that Morales made "an unfortunate choice of words" that did not amount to outrageous government conduct and that in any event, dismissal was too draconian a remedy. The trial court denied the motion, opting to allow the jury to "determine the significance" of Morales's comments. Separately, defendant moved in limine to preclude Witness No. 7 from testifying based on Morales's allegedly outrageous conduct. The trial court denied that motion as well.

On appeal, defendant contends the trial court erred in denying his motion to dismiss and, alternatively, his motion in limine to bar Witness No. 7 from testifying.

1. Factual Background

In May 2015 Morales and Assistant District Attorney Johanna Schonfield interviewed Witness No. 7 in prison; Morales recorded that interview.[5] About an hour and a half into that four-plus-hour interview, Schonfield asked Witness No. 7 "how much do you know about why [defendant] had to take off?" Witness No. 7 said he knew "everything" about it. Shortly thereafter, Witness No. 7 asked to go to the bathroom. When he returned, Morales was alone because Schonfield had left the room. Morales told Witness No. 7 they were looking for someone "legit and who [will] want to help themselves and stuff like that." Witness No. 7 asked what that meant and Morales responded, "well not even help yourself just kind of, like, lend not even truth but lend like the story of what was going on so we know that we're on the right track." Morales also told Witness No. 7 that "obviously we want a successful prosecution." After Schonfield reentered the room, Witness No. 7 said that prior to his murder, Joe had been "punking homies."

At trial both Witness No. 7 and Morales were asked about Morales's comments that he wanted Witness No. 7 to "lend not even truth but lend like the story of what was going on . . . ." and that he and Schonfield "want[ed] a successful prosecution." Witness No. 7 testified that he believed Schonfield and Morales were looking for the truth and that his testimony was truthful. Morales testified that the phrase "lend not even

[5] The trial court ordered that all pleadings and filings be filed under seal. Accordingly, significant portions of the record on appeal are under seal, including the transcript of Morales and Schonfield's May 2015 interview of Witness No. 7. However, much of the recording of that interview was played at trial, which was open to the public. And Morales and Witness No. 7 testified at trial about the portions of the interview that we discuss; the trial court did not order the record of their testimony sealed. Our factual summary is based solely on the trial transcripts, which are publicly available, and not on the sealed transcript of the May 2015 interview.

truth" was a "bad choice of wording." He denied that he was trying to get Witness No. 7 to provide false information. Morales testified that when he referred to "a successful prosecution," he meant that he wanted information "pertaining to the person responsible for [Joe's] death . . . [w]homever [*sic*] that may be."

The May 2015 interview was the first time Witness No. 7 discussed Joe's murder with law enforcement. Following a second interview, which took place in June 2015, an agreement was reached under which Witness No. 7's sentence would be reduced by five years if he testified truthfully against defendant.

2. Legal Principles

"[T]he outrageous governmental conduct doctrine . . . stems from a statement in *United States v. Russell*, 411 U.S. 423[, 431-432] (197[3]), in which the Supreme Court noted that it might 'some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' " (*United States v. D'Antoni* (7th Cir. 1989) 874 F.2d 1214, 1219.) While some federal circuits have refused to recognize the doctrine (see *United States v. Smith* (7th Cir. 2015) 792 F.3d 760, 765, fn. 25; *United States v. Amawi* (6th Cir. 2012) 695 F.3d 457, 483), others, including the Ninth Circuit, have reversed convictions under the outrageous government conduct doctrine. (*United States v. Black* (9th Cir. 2013) 733 F.3d 294, 302 [citing the "only two reported decisions in which federal appellate courts have reversed convictions under this doctrine"].) The Ninth Circuit has held that "[d]ismissing an indictment for outrageous government conduct . . . is 'limited to extreme cases' in which the defendant can demonstrate that the government's conduct 'violates fundamental fairness' and is 'so grossly shocking and so outrageous as to violate the universal sense of justice.' [Citation.] This is an 'extremely high standard.' [Citations.]" (*Ibid.*)

The California Supreme Court "has left open the possibility that [it] might accept the outrageous conduct defense." (*People v. Smith* (2003) 31 Cal.4th 1207, 1224, citing

People v. McIntire (1979) 23 Cal.3d 742.) California courts of appeal occasionally have concluded that outrageous government conduct merited dismissal of criminal charges. (See *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439 (*Velasco-Palacios*) [affirming dismissal of criminal charges as sanction for outrageous government misconduct where prosecutor deliberately altered an interrogation transcript to include a confession and that misconduct prejudiced defendant's constitutional right to counsel]; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261 ["the court's conscience is shocked and dismissal is the appropriate remedy" where "the prosecutor orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information"]; *People v. Guillen* (2014) 227 Cal.App.4th 934, 1007 (*Guillen*) [collecting cases].) This court has held that dismissal for outrageous government conduct is warranted only where the conduct impairs a defendant's constitutional right to a fair trial. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841, 884-885 (*Uribe*) [holding that prosecutor's false testimony at hearing on motions to disqualify the district attorney and to dismiss did not constitute outrageous governmental conduct in violation of due process where there was no showing that the misconduct prevented defendant from receiving a fair trial].)

"The determination of whether the government engaged in outrageous conduct in violation of defendant's due process rights is a mixed question" of fact and law. (*Uribe, supra,* 199 Cal.App.4th at p. 857.) We uphold the trial court's factual findings if they are supported by substantial evidence. (*Id.* at pp. 856-857.) And we review de novo the trial court's determination as to whether the governmental conduct at issue was outrageous in violation of the defendant's due process rights.[6] (*Id.* at p. 858; *Guillen, supra,* 227 Cal.App.4th at p. 1006.)

[6] The Second and Fifth Appellate Districts review rulings on motions to dismiss for outrageous government conduct for abuse of discretion. (*Velasco-Palacios, supra,* 235 Cal.App.4th at p. 445.)

3. Analysis

The conduct at issue here is Morales's statements to Witness No. 7 during the May 2015 interview that he wanted Witness No. 7 to "lend not even truth but lend like the story of what was going on . . . ." and that he and Schonfield "want[ed] a successful prosecution." In our view, those ambiguous statements did not constitute outrageous government conduct.

Morales himself recorded the statements, and that recording was disclosed to the defense and played for the jury at trial. Both Morales and Witness No. 7 were questioned on direct and cross-examination about their understanding of the statements. Thus, the jury was aware of the allegedly improper statements and was free to consider them in assessing Witness No. 7's credibility. Moreover, defendant does not argue, let alone establish, that Witness No. 7 gave false testimony. It follows that no showing has been made that the government knowingly introduced false testimony. In these circumstances, we discern no impairment of defendant's right to a fair trial. (See *United States v. Stinson* (9th Cir. 2011) 647 F.3d 1196, 1209 [affirming denial of motion to dismiss for outrageous government conduct where prosecution witness had history of perjury because "the jury was made aware of this history on direct and cross-examination and was free to weigh the testimony accordingly"]; *Hoffa v. United States* (1966) 385 U.S. 293, 311 [finding no due process clause violation where prosecution witness was a government informant with "motives to lie" because "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury" and the witness "was subjected to rigorous cross-examination" and the jury was properly instructed].) Accordingly, the trial court did not err in denying the motions to dismiss and to exclude Witness No. 7 from testifying.

C. Motions to Suppress Fruits of Allegedly Illegal Search Warrants

Defendant moved to suppress all evidence seized during two searches of his residence in 2004 and one search of his residence in 2006 on the theory that the underlying search warrants were unsupported by probable cause and there was no basis for applying the good faith exception to the exclusionary rule.[7] As noted above, police seized a significant amount of gang evidence, including photographs of defendant wearing red, flashing gang signs and posing with other known gang members; newspaper articles about the indictment of Nuestra Familia members; a federal indictment of Nuestra Familia members; a copy of an early version of the Nuestra Familia constitution; and reading material associated with Nuestra Familia during those searches. The trial court denied the suppression motion, a ruling defendant challenges on appeal. We conclude that the search warrants were supported by probable cause. And even if probable cause was lacking as to the contested 2004 search warrant, the good faith exception to the exclusionary rule would apply.

---

[7] As discussed below, there are two relevant search warrants and related affidavits—one warrant was issued on October 21, 2004 (the first 2004 search warrant) and the other was issued in March 2006 (the 2006 search warrant). Both search warrants and the search warrant affidavits were filed under seal in the trial court. We requested supplemental briefing from the parties as to the possible unsealing of those records. The parties indicated that the records could be unsealed because the information they contain has been publicly disclosed elsewhere, namely in open court during defendant's trial and in a separate appellate court decision. Having determined that the facts relevant to our decision on appeal are no longer subject to an "overriding interest that overcomes the right of public access" to the records (see Cal. Rules of Court, rule 2.550(d); *NBC Subsidiary* (*KNBC-TV*), *Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46), we informed the parties of the court's intent to unseal the first 2004 search warrant and the 2006 search warrant as required by rule 8.46(f)(3) of the Rules of Court. The parties asserted no opposition. Accordingly, concurrent with the filing of this opinion, we hereby order the first 2004 search warrant and accompanying affidavit and the 2006 search warrant and accompanying affidavit to be unsealed in their entirety. (Cal. Rules of Court, rules 2.551(h), 8.46(f).)

1. Legal Principles and Standard of Review

"The Fourth Amendment to the United States Constitution prohibits 'unreasonable searches and seizures' and requires search warrants to be issued only upon a showing of 'probable cause' describing with particularity 'the place to be searched, and the . . . things to be seized.' (U.S. Const., 4th Amend.)" (*People v. Westerfield* (2019) 6 Cal.5th 632, 659 (*Westerfield*).) "Probable cause sufficient for issuance of a warrant requires a showing that makes it ' "substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought." ' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 161.) "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." (*Maryland v. Pringle* (2003) 540 U.S. 366, 370-371.) It is " 'less than a preponderance of the evidence or even a prima facie case.' " (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 370 (*Bryant*).)

"In determining whether probable cause exists, a neutral and detached magistrate must evaluate the totality of the circumstances set forth in the search warrant affidavit to make a practical, common-sense decision whether 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' " (*United States v. Parks* (9th Cir. 2002) 285 F.3d 1133, 1142.) That determination cannot be based on "the bare conclusions of others." (*Illinois v. Gates* (1983) 462 U.S. 213, 239 (*Gates*).) Therefore, an affiant's "mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause" is insufficient to support the issuance of a search warrant. (*Ibid.*) Nor can a search "be justified by only a mere hunch." (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 565.) However, "issuing judges may rely on the training and experience of affiant police officers." (*United States v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 978.) The "facts supporting the warrant application [must] establish [that] it is substantially probable the evidence sought

will *still* be at the location at the time of the search." (*Bryant, supra,* 60 Cal.4th at p. 370.) Otherwise, the information is considered too stale to support a warrant. Determining whether information is stale is fact-specific and not susceptible to any bright-line rules. (*Ibid*.)

" 'The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' [Citations.]" (*Westerfield, supra,* 6 Cal.5th at p. 659.) We subject the magistrate's determination of probable cause to deferential review and will upset it " 'only if the affidavit fails as a matter of law to set forth sufficient competent evidence' supporting the finding of probable cause." (*Id.* at pp. 659-660.)

"Ordinarily, the exclusionary rule—a 'judicially created remedy designed to safeguard Fourth Amendment rights'—[operates] to preclude 'the use of evidence obtained in violation' of the Fourth Amendment. [Citation.]" (*United States v. Barnes* (9th Cir. 2018) 895 F.3d 1194, 1201.) However, under the good faith exception to the exclusionary rule, evidence seized by police officers acting "in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid for lack of probable cause" need not be suppressed. (*People v. Willis* (2002) 28 Cal.4th 22, 30.) The good faith exception applies where a reasonably well trained officer would not have known that the search was illegal despite the magistrate's authorization. (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508.) It does not apply where the supporting affidavit is " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (*United States v. Leon* (1984) 468 U.S. 897, 923.)

2. The 2004 Search Warrants

Police obtained and executed two warrants to search defendant's residence in October 2004. The second warrant authorized the seizure of items that were found

during the execution of the first 2004 search warrant but were not included in that warrant. Accordingly, the parties agree that the second 2004 search warrant was valid if the first 2004 search warrant was valid, and vice versa.

The affidavit supporting the first 2004 search warrant stated that a man was shot and killed in Santa Cruz on the morning of July 25, 2004. Later that month, Juan Lorenzo Soto and Anthony Raymond Gonzales were arrested for the murder. Police interviewed Gonzales's girlfriend, Vanessa M., on August 20, 2004. She told them that on the evening of July 25, 2004, defendant's brother Julio called her and told her to come to his house with her and Gonzales's child. When she arrived at the home, where she said defendant lived too, defendant was standing outside a blue Chevy Silverado or GMC Sierra pick up truck. He opened one of the vehicle doors and Gonzales got out. Vanessa saw Soto and Francisco Valenciano sitting in the vehicle and noticed that Gonzales was wearing different clothing than he had been wearing when he left their house before the murder. Gonzales said goodbye to Vanessa and their child and said that he was leaving and not coming back.

According to the affidavit, Vanessa also related to police information she had heard second-hand from one of Gonzales's relatives. That relative told Vanessa that Gonzales said that he, Soto, Valenciano, and defendant had gone to Hollister to shower, change clothes, and burn the clothing they had been wearing at the time of the shooting. The affiant stated that, based on his training and experience, criminals often disclose information that is based upon truth, but that information may be intentionally misleading to avoid detection or be misunderstood by the listener. Accordingly, the affiant stated that he expected to find clothing worn during the commission of the murder and/or remains of burnt clothing or evidence of a burn site at defendant's residence.

The affidavit stated that police had observed a vehicle on defendant's property in mid-October 2004 that matched the description of the vehicle Vanessa had seen on the evening of the murder. And Watsonville Police had pulled defendant over while he was

driving a vehicle similar to the one she had described. The affiant further stated that he had learned from Watsonville police officers that Soto, Gonzales, Valenciano, defendant, and defendant's brother all were validated Norteño gang members. On August 25, 2004, Valenciano also was arrested for the murder.

"The affidavit must establish a nexus between the criminal activities and the place to be searched. [Citation.]" (*People v. Garcia* (2003) 111 Cal.App.4th 715, 721.) "For a finding of probable cause to satisfy this nexus requirement, there must be a fair probability both that a crime has been committed and that evidence of its commission will be found in the location to be searched. [Citations.]" (*United States v. Tan Duc Nguyen* (9th Cir. 2012) 673 F.3d 1259, 1263.) Defendant contends the magistrate lacked a sufficient basis to conclude that evidence pertaining to the murder would be found at his home. For the following reasons, we disagree.

As defendant apparently does not dispute, the affidavit established probable cause to believe that Gonzales, Soto, and Valenciano (the suspects) were involved in the murder. It also established that defendant and the suspects were Norteños. The affidavit contained information, based on Vanessa's first-hand observations, that the suspects were on defendant's property following the murder, at which time at least one suspect was wearing different clothing than he had been wearing earlier that day. According to Vanessa, the suspects were in a vehicle that independent police work indicated was associated with defendant and his residence. And Gonzales told Vanessa, in defendant's presence, that he was leaving and not returning. A magistrate could reasonably infer from the foregoing information that defendant tried to help the suspects avoid arrest and flee. And a magistrate could reasonably conclude, based on defendant's role as an accessory after the fact and the suspects' presence on his property shortly after the killing, that there was a "fair probability" that the suspects' clothing, remains of that clothing, or other evidence of the murder would be found at defendant's residence.

Vanessa also relayed information to police that Gonzales had told to a third party, which the third party in turn had relayed to Vanessa: namely, that the suspects changed and burned their clothing in Hollister with defendant's help. Defendant argues that information undermines any conclusion that the suspects' clothing would be found at his residence. But a magistrate using common sense and considering the totality of the circumstances could reasonably have concluded that Vanessa's first-hand observations were more reliable than the information she heard second-hand. And the magistrate could therefore have accorded less weight to the information that the clothing evidence was destroyed in Hollister.[8] Furthermore, as noted above, the magistrate reasonably could have concluded that other evidence of the murder would be found at defendant's residence, given that he was an accessory after the fact and the suspects were on his property hours after the killing.

Defendant also argues that the information police obtained from Vanessa in August regarding events that had occurred in July was stale by the time the warrant was issued in October. As to staleness, the question is whether there was sufficient basis to believe that the evidence sought was still on the premises three months after the murder. There was. The items sought in the search warrant were not of a consumable or transient nature. And defendant had no reason to believe police could connect his residence to the murder, which he did not commit and for which other suspects had been arrested. Accordingly, there was a fair probability that any clothing evidence concealed or partially destroyed at his residence remained there. (See *United States v. Jacobs* (9th Cir. 1983) 715 F.2d 1343, 1346 [probable cause to search residence for clothing worn by robbers

[8] We acknowledge that Vanessa's first-hand observations and the information she heard second-hand are not irreconcilable. Conceivably, the suspects could have committed the murder in Santa Cruz, met up with defendant, traveled to Hollister to change clothing, then backtracked to defendant's residence near Watsonville, only to flee. But the magistrate reasonably could have concluded that it was more likely that the Hollister detail in the second-hand account was inaccurate.

during bank robbery three and a half months earlier held not to be stale]; *United States v. Steeves* (8th Cir. 1975) 525 F.2d 33, 38 (*Steeves*) [probable cause to search residence for clothing worn during bank robbery nearly three months earlier held not to be stale].)

Even if the first 2004 search warrant was unsupported by probable cause, the trial court did not err in denying the motion to suppress because the good faith exception to the exclusionary rule applies. Defendant contends that any reasonably well-trained police officer would have realized that the affidavit supporting the first 2004 search warrant was lacking in any indicia of probable cause due to its reliance on speculation and stale information. Not so. The affidavit included information that the suspects were on defendant's property in the hours after the murder and supported a reasonable inference that defendant was helping the suspects flee. Even assuming the link between the murder and defendant's residence was too weak to support a finding of probable cause to search, we cannot say the affidavit was so facially deficient as to preclude the application of the good faith exception. (See *United States v. Carpenter* (6th Cir. 2004) 360 F.3d 591, 596 [good faith exception applies where "the affidavit contained a minimally sufficient nexus between the illegal activity and the place to be searched to support an officer's good-faith belief in the warrant's validity, even if the information provided was not enough to establish probable cause"].) As to the lapse of time between the murder and the execution of the search warrant, given the fact-specific nature of the staleness inquiry and the durable nature of the items sought, we cannot say the officers were objectively unreasonable in their reliance on the warrant and affidavit.

3. The 2006 Search Warrant

Police obtained a warrant to search defendant's residence the day after Joe's death in March 2006. Among other things, the search warrant authorized officers to search for firearms, firearm-related items (e.g., spent casings, ammunition, gun cleaning items or kits, photographs of firearms, and paperwork showing firearm ownership or possession), indicia of ownership or possession of the burned Toyota pickup truck, and materials that

may have used to burn the pickup truck. Defendant argues that even if the underlying affidavit provided probable cause to believe that he shot and killed Joe and burned the pickup truck, the magistrate lacked a sufficient basis to conclude that any evidence of the murder or arson would be found at his residence. We disagree.

As defendant notes, "[m]ere evidence of a suspect's guilt provides no cause to search his residence. [Citation.] However, '[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items.' " (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) Here, defendant was suspected of committing murder with a firearm. The warrant sought items connecting defendant to the murder weapon, including ammunition and gun cleaning kits. California and federal courts have recognized that gun owners commonly keep their guns in their homes. (See *People v. Lee* (2015) 242 Cal.App.4th 161, 173 ["it is no great leap to infer that the most likely place to keep a firearm is in one's home"]; *Peffer v. Stephens* (6th Cir. 2018) 880 F.3d 256, 271 [" 'individuals who own guns keep them at their homes' "]; *Steeves, supra,* 525 F.2d at p. 38 ["people who own pistols generally keep them at home or on their persons"].) Common sense dictates that gun owners are likely to keep items associated with their guns, such as ammunition and gun cleaning kits, in the same place that they store their guns (i.e., at home). Defendant also was suspected of burning the pickup truck found on Johnson Road, but it was not registered to him. The warrant sought items connecting defendant to that truck. Common sense supports the conclusion that people often keep important documents, such as vehicle titles and insurance documents, in their homes. Accordingly, we conclude that the 2006 search warrant was supported by probable cause.

D. Denial of Motion to Bifurcate Gang Enhancement and Special Circumstance from Murder Charge

Defendant contends the trial court erred in denying his pretrial motion to bifurcate the trial on the gang enhancement and gang-murder special circumstance allegations from the trial on the murder charge. The Attorney General responds that there was no error because the gang evidence was necessary to prove motive. We find no abuse of discretion.

1. Legal Principles

Section 1044 vests the trial court with broad discretion to control the conduct of a criminal trial, including the authority to bifurcate trial issues. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.) Pursuant to that authority, a trial court has the discretion to bifurcate trial of a gang enhancement from trial of guilt.[9] (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In *Hernandez*, our Supreme Court indicated that bifurcation is warranted where, for example, the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Ibid.*) But the *Hernandez* court also noted that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense . . . [to] prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid.*) "[T]he trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Id.* at p. 1050.) We review the trial court's denial of the motion to bifurcate for abuse of discretion. (*Id.* at p. 1048.)

[9] We shall assume that the court likewise has the authority to bifurcate trial of a gang-murder special circumstance.

2. Analysis

The prosecution's theory was that defendant killed Joe for disrespecting gang members. Accordingly, at least some of the gang evidence would have been relevant and admissible in a separate trial on guilt to show defendant's motive for committing the charged crime and, by extension, his identity as the shooter and his intent to kill. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 ["Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related."]; *People v. Williams* (1988) 44 Cal.3d 883, 911 ["the evidence was relevant to motive, and thus to both intent and identity"]; *People v. Daniels* (1971) 16 Cal.App.3d 36, 46 ["evidence of motive to commit an offense is evidence of the identity of the offender"].)

Defendant acknowledges that "some gang evidence might have been necessary to suggest a motive to kill," but says it would not have been "necessary for all of the prejudicial gang evidence" to be admitted in the guilt phase had the gang allegations been tried separately. Yet defendant fails to specifically identify which pieces of gang evidence should have come in and which should have been excluded in a hypothetical separate trial on guilt. And to the extent he argues particular gang evidence should have been excluded, we are not persuaded. For example, defendant appears to argue that all of Witness No. 7's testimony that was unrelated to the murder charge should have been excluded from a hypothetical separate trial on the murder charge only. But some of that testimony—namely Witness No. 7's discussion of defendant's involvement in Escobedo's attempted murder and in narcotics sales—was admitted not only to prove the gang allegations but also to prove intent to kill.[10] Thus, defendant has not carried his

[10] The court instructed jurors with CALCRIM No. 375 that they could consider "evidence that the defendant committed the offenses of aiding and abetting Tony Rubalcava and [Witness No. 7] in the attempted murder of Mark Escobedo, and aiding and abetting [Witness No. 7] in the possession for sale of controlled substances" for

burden to show the trial court abused its discretion in concluding that the evidence was so inextricably intertwined as to mandate a single proceeding.

Even if the trial court abused its discretion by declining to bifurcate, any error in admitting the gang evidence was harmless under any standard. As discussed above, the evidence that defendant was guilty of Joe's murder was strong. Defendant was the last person to be seen with Joe before his death. Joe identified defendant as his shooter shortly before dying. Defendant had a motive to kill Joe. There was evidence that defendant owned a .38-caliber revolver and that Joe was shot with either a .38-caliber revolver or a .357 magnum revolver. Defendant's truck was intentionally burned and abandoned on the night of the shooting and defendant fled to Mexico. Moreover, the trial court instructed the jury with CALCRIM No. 1403 to consider "evidence of gang activity only for the limited purpose of deciding whether . . . [¶] [t]he defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related allegations charged; [¶] or [¶] [t]he defendant had a motive to commit the crime charged" and not to "conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." We presume that the jury followed that limiting instruction. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.) In light of that instruction and the strong evidence of guilt, the denial of the motion to bifurcate and the resulting admission of gang evidence, even if erroneous, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

E. Sufficiency of the Evidence Supporting the Gang-Murder Special Circumstance

The jury found the gang-murder special circumstance allegation to be true. (§ 190.2, subd. (a)(22).) The gang-murder special circumstance, which provides for punishment of death or life imprisonment without the possibility of parole, applies if

---

various "limited purpose[s]," including in deciding whether "defendant acted with the intent to kill in this case."

"[t]he defendant intentionally killed [Joe] while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).)

Defendant contends that finding is not supported by sufficient evidence for two reasons. First, he claims the evidence showed he was an active participant in the Nuestra Familia *prison gang*, but not in any *criminal street gang*. In other words, defendant argues that prison gangs, including the Nuestra Familia, are not criminal street gangs, as that term is defined in section 186.22, subdivision (f). Second, defendant asserts that a murder is "carried out to further the activities of [a] criminal street gang" for purposes of section 190.2, subdivision (a)(22) only if more than one gang member participated in the murder. Neither contention has merit.

1. Standard of Review

"When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Cortes* (1999) 71 Cal.App.4th 62, 71.) "In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (*Ibid*.) The foregoing substantial evidence standard of review applies to special circumstances as well as to substantive offenses. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414.) To the extent that defendant's claims involve issues of statutory interpretation, we review those issues de novo. (*Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 549 (*Fry*).)

2. Substantial Evidence Supports the Jury's Finding That Defendant Was an Active Participant in a Criminal Street Gang

One of the requirements of the gang-murder special circumstance is that "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22 . . . ." (§ 190.2, subd. (a)(22).) Section 186.22, subdivision (f) defines "criminal street gang" to mean "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." The criminal acts enumerated in section 186.22, subdivision (e) are referred to as "predicate offenses" and include robbery, unlawful homicide or manslaughter, the sale of controlled substances, and felony extortion. (§ 186.22, subds. (e)(2), (e)(3), (e)(4), and (e)(19); *People v. Tran* (2011) 51 Cal.4th 1040, 1044.)

Nuestra Familia meets this statutory definition. Walker, a gang expert, testified that Nuestra Familia is an organization that has been in existence since the 1960s and that it had approximately 50 to 60 members in 2006. His testimony is substantial evidence that Nuestra Familia is an "ongoing organization, association, or group of three or more persons . . . ." (§ 186.22, subd. (f).)

Walker further testified that Nuestra Familia is "an organized crime group," the purpose of which is to generate money through criminal activities, including "the sales of controlled substances, robberies, [and] extortion . . . ." Walker also testified that the primary activities of Nuestra Familia in Santa Cruz County in 2006 were drug dealing, money laundering, and robberies. Witness No. 7 testified that he sold drugs and robbed and extorted other drug dealers on behalf of the Nuestra Familia regiment in Watsonville.

He also testified that he was required to contribute money from those illegal activities to the regiment and to incarcerated Nuestra Familia members. Walker testified that Nuestra Familia has procedures or guidelines for its regiments and that one of the Nuestra Familia generals is in charge of all Nuestra Familia activity on the streets. The foregoing is substantial evidence that robbery, the sale of controlled substances, and felony extortion are among Nuestra Familia's "primary activities . . . ." (§ 186.22, subd. (f).)

Walker testified that the official symbol of Nuestra Familia is a sombrero with a dagger through it. He also testified that Nuestra Familia members frequently have the words "Nuestra Familia" or the initials "NF" tattooed on their bodies. His testimony is substantial evidence that Nuestra Familia has a common name and common identifying sign or symbol. (§ 186.22, subd. (f).)

The final element of the statutory definition of "criminal street gang" is that "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) Section 186.22, subdivision (e), defines "pattern of criminal gang activity" to mean "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" predicate offenses, "provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." The predicate offenses enumerated in section 186.22, subdivision (e) include robbery (§ 211) and murder (§ 187). (§ 186.22, subds. (e)(2) and (e)(3).)

The parties stipulated that defendant and Javier Martinez were convicted of robbing Jose Romo in violation of section 211. The parties further stipulated that those offenses took place on August 10, 1995. Witness No. 7 and gang expert Morales testified that Martinez is a member of Nuestra Familia. The parties stipulated that Juan Lorenzo Soto was convicted of a robbery that took place on July 25, 2004. Witness No. 7 testified that Soto was a member of Nuestra Raza. Morales testified that Soto was a member of

Nuestra Raza at the time of his crimes and had since become a member of Nuestra Familia. The parties stipulated that Anthony Raymond Gonzalez was convicted of committing murder (§ 187), three counts of robbery (§ 211), and three counts of attempted robbery (§§ 664, 211). Each of his offenses occurred on July 25, 2004. Morales testified that Gonzalez is a member of Nuestra Raza. The parties stipulated that Antonio Rubalcava was convicted of an attempted murder that took place on September 17, 2005. Witness No. 7 testified that Rubalcava was a member of the Watsonville Nuestra Familia regiment and is a member of Nuestra Familia. Morales also testified that Rubalcava is a member of Nuestra Familia. The foregoing is substantial evidence of a pattern of criminal gang activity.[11]

Defendant's contention that Nuestra Familia does not meet the section 186.22, subdivision (f) definition of "criminal street gang" merely because witnesses characterized it as a "prison gang" finds no support in the plain language of that provision. Nor does section 186.21, on which defendant relies, support his contention that Nuestra Familia is not a section 186.22, subdivision (f) "criminal street gang." Section 186.22 is part of the California Street Terrorism Enforcement and Prevention Act (the STEP Act) (§ 186.20 et seq.). (*People v. Rios* (2013) 222 Cal.App.4th 542, 557.) Section 186.21 sets forth the legislative findings underlying the adoption of that legislation, including that "the State of California is in a state of crisis which has been

---

[11] Some of the predicate offenses were committed by members of Nuestra Raza. As required by *Prunty*, the prosecution showed "associational or organizational connection uniting" Nuestra Raza and Nuestra Familia. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) In particular, there was evidence that the two groups "are part of the same . . . hierarchical organization," including Morales's testimony that Nuestra Familia, Nuestra Raza, and Norteño street gangs are part of a single organization and Walker's testimony that Nuestra Familia created Nuestra Raza as a subordinate organization to act on its behalf. (*Ibid*.) There also was evidence that Nuestra Raza is controlled by Nuestra Familia, including Walker's testimony that Nuestra Raza is governed by the 14 bonds, which were issued by Nuestra Familia. (*Id*. at p. 77 ["the subsets may still be part of the same organization if they are controlled by the same locus or hub"].)

caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." Section 186.21 further declares that "[i]t is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." Significant evidence was presented at trial that Nuestra Familia members carry out and direct criminal activity that terrorizes citizens, making it precisely the sort of organization that the Legislature had in mind when it enacted the STEP Act. Specifically, the evidence showed that the Nuestra Familia constitution addresses how to conduct *street operations*, that one of Nuestra Familia's three generals is in charge of all Nuestra Familia activity *on the streets*, and Nuestra Familia makes money through geographically based *regiments that operate on the street* and take orders directly from Nuestra Familia.

3. Substantial Evidence Supports the Jury's Finding That Defendant Murdered Joe to Further the Activities of a Criminal Street Gang

The gang-murder special circumstance also requires that "the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) Defendant contends that phrase should be construed to require the participation of at least two gang members in the murder. For that argument, he relies on *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), in which our Supreme Court held that a lone actor cannot violate section 186.22, subdivision (a). As discussed below, significant linguistical differences between section 190.2, subdivision (a)(22) and section 186.22, subdivision (a) convince us that *Rodriguez* does not compel the reading defendant advocates, which is not supported by the plain statutory language.

Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged

in, a pattern of criminal gang activity, and who *willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang,* shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (Italics added.) *Rodriguez* held that the plain meaning of the italicized phrase "requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Rodriguez, supra,* 55 Cal.4th at p. 1132.) The court based its reading of the statute on "the language and grammatical structure of the statute." (*Ibid*.) Specifically, the court noted that section 186.22, subdivision (a) "speaks of 'criminal conduct by [gang] *members*' "—plural—such that "a defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct" to come within the bounds of the statute. (*Rodriguez, supra,* at p. 1132.)

Section 190.2, subdivision (a)(22) requires that the defendant have carried out "the murder . . . to further the activities of the criminal street gang." Under section 190.2, subdivision (a)(22), the defendant's requisite act is murder to further the activities—generally—of the criminal street gang. That is an act that can be carried out alone. By contrast, under section 186.22, subdivision (a), the defendant's requisite act is the "promot[ion], further[ance], or assist[ance]" of specific "felonious criminal conduct by members of [his] gang . . . ." As *Rodriguez* explains, one cannot promote, further, or assist in *specific criminal conduct* by *members* of a gang by one's self.

IV. DISPOSITION

The judgment is affirmed.

_____

ELIA, ACTING P. J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

People v. Cabrera
H044409